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the Commission's orders except when they (1) violate constitutional safeguards, (2) exceed the power conferred by the statute, or (3) proceed upon a mistake of law. The purpose of the federal regulative scheme is one with that of the state; the legislative intent in each instance is to secure the supremacy of the administrative tribunal within the field committed to it, and yet to preserve from invasion the constitutional and statutory rights of the parties litigant. The federal courts are not embarrassed by a statute possessing such distinctive attributes as the California Public Utilities Act, but the reviewing power committed to the judiciary under the Act to Regulate Commerce hardly transcends the barest necessities. We may reasonably anticipate that the measure of review here reposed in the federal courts will substantially determine the limits of inquiry upon certiorari under the California practice. The decision in *Del Mar Water Company v. Eshleman*<sup>8</sup> looks in this direction, and the text of section 67 seemingly contemplates this result.

O. K. P.

**TENDER: TENDER IN WRITING UNDER CODE PROVISIONS.**—The California Code of Civil Procedure provides that one to whom a tender is made, must, "at the time, specify his objection or he must be deemed to have waived it,"<sup>1</sup> and that, "an offer in writing to pay a particular sum of money, or to deliver a written instrument, or specific personal property, is, if not accepted, equivalent to the actual production of the money, instrument or property."<sup>2</sup> Since a refusal to perform upon tender, if the latter is properly made, is a breach of contract for which an action lies,<sup>3</sup> and since, under the first section quoted above, objections not made at the time of the tender are waived, the effect of a written tender becomes a matter of importance.

At common law, actual production of the thing tendered was necessary,<sup>4</sup> whether it was money, chattels, or an instrument, unless the party to whom the tender was due, did something which dispensed with the formal tender.<sup>5</sup> The code has evidently changed the common law, but it is not immediately apparent, from the Code sections quoted, how far this change actually goes. Actual production, at least, is dispensed with in the situations

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\* (1914), 167 Cal. 666, 140 Pac. 948.

<sup>1</sup> Cal. Code Civ. Proc., § 2076.

<sup>2</sup> Cal. Code Civ. Proc., § 2074.

<sup>3</sup> *Ripley v. McClure* (1894), 44 Exch. 344.

<sup>4</sup> *Finch v. Brook* (1834), 1 Bing. N. C. 253, 131 Eng. Rep. R. 1114; *People v. Harris* (1858), 9 Cal. 572, 573; *Deering Harvesting Co. v. Hamilton* (1900), 80 Minn. 162, 83 N. W. 44; *Te Poel v. Shutt* (1899), 57 Neb. 592, 78 N. W. 288.

<sup>5</sup> Such as refusal to perform, *Sheplar v. Green* (1893), 96 Cal. 218, 31 Pac. 42; repudiation, *Scribner v. Schenkel* (1900), 128 Cal. 250, 60 Pac. 860; prevention of tender, *Hochster v. De la Tour* (1853), 2 El. & Bl. 678, 118 Eng. Rep. R. 922.

covered by the Code provisions, if the party making the written offer of performance is able to perform.

The Supreme Court in *Allen v. Chatfield*<sup>6</sup> was called upon further to construe the section. In that case, the holder of the title to certain realty agreed to sell the land. The title was in litigation and it was provided in the contract that the vendor was to have twelve months within which to cure any valid objection to the title and thereafter, until final judgment could be obtained in the litigation then pending in regard to the title. Before a final determination of the suit in regard to the title, the vendor offered to convey, the offer being made in writing. The vendee did not accept the offer and brought the present suit for a return of the deposit of \$5000 made by him. Heretofore the California court has not been called upon to construe the code provision as closely as was required in this case. From the general language in some former decisions,<sup>7</sup> it might be inferred that one to whom a written offer of performance had been made, must, if he does not accept, carefully specify his objections to the tender. If such were the case and if there were defects not apparent upon the face of the written offer, such as inability to perform, the one to whom the tender was made would be put in such a position that he would have to search for such defects. He would, at the time, have to specify his objection or be precluded from afterwards making any objection to the tender. In other words the Code would have provided a trap for the unwary. But the court very happily refuses to allow form to play such an important part in twentieth century law.

Suppose A agrees to sell B a horse for \$1000 on January 1st. Is B, who on January 1st, has no money at all, to be allowed to recover damages for breach of contract from A, because on January 1st, B writes A a letter offering to pay him the \$1000, which offer A does not accept? Should the law reward a man for offering to do that which he cannot and knows he cannot do? Must A exert himself to find out that B has no money and specify that objection or be precluded? Is bad faith to be put at a premium? These questions must be answered in the negative.

The Code has liberalized the law of tender, but liberality must be rational. The court very properly holds that the common law requisites of a tender are still in force,<sup>8</sup> except that the actual production of the thing itself is no longer required, if not accepted. And so, in the principal case, the fact that the offer was in writing,

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<sup>6</sup> (Feb. 5, 1916), 51 Cal. Dec. 188, 156 Pac. 47.

<sup>7</sup> *Levis v. Royal P. & D. Co.* (1905), 1 Cal. App. 241, 81 Pac. 1086; *Herberger v. Husman* (1891), 90 Cal. 583, 27 Pac. 428; *Latimer v. Capay V. L. Co.* (1902), 137 Cal. 286, 70 Pac. 82; *Kofoed v. Gordon* (1898), 122 Cal. 314, 54 Pac. 1115; see 3 California Law Review, 170.

<sup>8</sup> *Allen v. Chatfield* (Feb. 5, 1916), 51 Cal. Dec. 188, 192, 156 Pac. 47.

did not make a premature offer valid, if not accepted, nor in another aspect did it make a tender in bad faith valid. The offeror must be ready and able to make his offer good. No magic is to be attached to the writing. It merely dispenses with production—a burdensome requirement of the common law. Despite the general language in the California opinions heretofore referred to, this position has been indicated in prior California decisions<sup>9</sup> and is in accordance with the views of courts in other states having similar statutory provisions.<sup>10</sup>

R. S. M.

TRUSTS: RESTRAINTS ON ALIENATION: SPENDTHRIFT TRUSTS.—The case of *McColgan v. Magee*<sup>1</sup> presents a variation upon the ordinary attempt to create a spendthrift trust. Four persons were the beneficiaries under a deed of trust which provided that any three might terminate the trust at any time, and that upon any termination thereof, one-fourth of the trust property should go to each one. In terminating the trust the four beneficiaries agreed to place the defendant's one-fourth share in trust, the income from his share to go to the defendant, but his entire interest and the income therefrom to be inalienable and inaccessible to his creditors during the defendant's life. In an action by a creditor to reach the property subject to this new trust the court held that the attempt to restrain its alienation must fail.

Ever since the case of *Nichols v. Eaton*,<sup>2</sup> spendthrift trusts have been more and more generally upheld in the United States.<sup>3</sup> That the policy of permitting such dispositions of property has met with favor in this country is demonstrated by the fact that legislation has supported them even in some states where the courts had refused to allow them.<sup>4</sup> The English rule still forbids spendthrift trusts, although the exception in favor of married women still exists there.<sup>5</sup>

American courts differ somewhat as to how spendthrift trusts may be created, but the general rule is that one may settle property in trust for another who has no interest in it, and gives no valuable consideration for it, in such a manner that the beneficiary cannot alienate it, or subject it to the claims of his creditors.<sup>6</sup> This dis-

<sup>9</sup> *Colton v. Oakland Bank of Savings* (1902), 137 Cal. 376, 70 Pac. 225; *Doak v. Bruson* (1907), 152 Cal. 17, 20, 91 Pac. 1001.

<sup>10</sup> *Kuhns v. Chicago etc. R. R. Co.* (1885), 65 Iowa, 528, 22 N. W. 661, apparently overruling *Shugart v. Pattee* (1873) 37 Iowa, 422; *McCourt v. Johns* (1898), 33 Ore. 561, 53 Pac. 601; *Hyams v. Bamberger* (1894), 10 Utah, 3, 36 Pac. 202.

<sup>1</sup> (Feb. 28, 1916), 51 Cal. Dec. 297, 155 Pac. 995.

<sup>2</sup> (1875), 91 U. S. 716, 23 L. Ed. 254.

<sup>3</sup> *Seymour v. McAvoy* (1898), 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; *Wagner v. Wagner* (1910), 244 Ill. 101, 91 N. E. 66.

<sup>4</sup> *De Vaughn v. Hays* (1913), 140 Ga. 208, 78 S. E. 844.

<sup>5</sup> *Bolitho & Co. v. Gidley*, L. R. [1905] A. C. 98.

<sup>6</sup> *Hale v. Bowler* (1913), 215 Mass. 354, 102 N. E. 415.